APPENDIX A

No. 16941

United States Court of Appeals

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
WERT LANELVIN AKINS,
Defendant-Appellant.

APPEAL from the United States District Court for the Western District of Tennessee, Western Division.

Decided February 6, 1967.

Before WEICK, Chief Judge, and PHILLIPS and MCCREE, Circuit Judges.

PHILLIPS, Circuit Judge. Appellant was found guilty by a jury on five counts of a six-count indictment charging him with causing gambling supplies and equipment to be shipped in interstate commerce with the intent of carrying on his unlawful gambling business in Tennessee, in violation of 18 U.S.C. § 1952.

It is undisputed that appellant was owner and operator of a professional gambling casino known as "Turf Club" in Tipton County, Tennessee, some eighteen to twenty miles north of Memphis, and that this club was operated

in violation of T.C.A. §§ 39-2002-2005, 39-2031-2032. He had owned and operated this club since January 1962.

During September and October 1964 and January 1965, appellant caused certain gambling supplies and paraphernalia to be shipped to him in Memphis by REA express from Chicago, Illinois.

The principal question on this appeal relates to the issue of entrapment, which appellant insists the district court should have decided in his favor as a matter of law instead of submitting it to the jury. Appellant contends that he was entrapped by agents of the Government into the commission of the offense for which he was charged, and that the district court committed reversible error in overruling his motion for acquittal.

The gambling supplies here involved were shipped to appellant from Chicago by Charles P. Stahl, doing business as Taylor & Company. Appellant's defense of entrapment is based upon a "consent agreement" or "cease and desist agreement" executed by Stahl after an investigation of his business by agents of the Federal Bureau of Investigation.

For some time prior to 1964, FBI agents had been conducting an investigation of Stahl's operations in Chicago. In 1964 Stahl signed an agreement to cease and desist from the manufacturing, printing, sale or distribution of certain items of gambling paraphernalia previously sold by him. A copy of this agreement is made an appendix to this opinion.

Appellant contends that the dice, cards, chips and other paraphernalia shipped to him by Stahl were not included in the "cease and desist" agreement; that Government agents led Stahl to believe that he could ship such items legally in interstate commerce and could inform his cus-

tomers to that effect; that the shipments from Stahl to appellant came about as a result of "deceitful representations and inducements" on the part of Government agents; and that the Government devised this scheme to use Stahl as an agent to entrap appellant into violating 18 U.S.C. § 1952.

To establish the defense of entrapment as a matter of law, the controlling facts must be undisputed. *Sherman* v. *United States,* 356 U.S. 369; *United States* v. *Thompson,* 366 F.2d 167 (C.A. 6), cert. denied, —— U.S. ——, 35 U.S.L. Week 3198; *United States* v. *Cooper,* 321 F.2d 456 (C.A. 6). Where the evidence and the inferences properly deducible therefrom are conflicting, the issue of entrapment is a question of fact to be submitted to the jury. *Osborn* v. *United States,* —— U.S. ——, 35 U.S.L. Week 4067, affirming *United States* v. *Osborn,* 350 F.2d 497 (C.A. 6); *United States* v. *Head,* 353 F.2d 566 (C.A. 6); *United States* v. *Littwin,* 338 F.2d 141 (C.A. 6), cert. denied, 380 U.S. 911; *United States* v. *Williams,* 319 F.2d 479 (C.A. 6).

On appeal, "In determining whether entrapment has been established as a matter of law, the evidence as well as inferences properly deducible therefrom should be considered in the light most favorable to the Government." *United States* v. *Cooper, supra,* 321 F.2d at 457, citing *United States* v. *Berkley,* 288 F.2d 713 (C.A. 6), cert denied, 368 U.S. 822.

We hold that the "cease and desist" agreement executed by Stahl (appendix hereto) did not constitute entrapment as a matter of law, and that the defense of entrapment presented an issue of fact which properly was submitted by the district judge to the jury under the facts of this case.

Appellant further contends that the district judge, the Honorable Marion S. Boyd, committed reversible error in his charge to the jury and in rejecting special charges submitted by appellant. We hold that the charge, when read as a whole, sets forth an accurate statement of the law of entrapment. *Sherman* v. *United States, supra,* 356 U.S. 369; and *Sorrels* v. *United States,* 287 U.S. 435.

Since the district judge stated the applicable law of entrapment fully and fairly in his general charge, he did not commit reversible error in refusing the special instructions requested by appellant. *Petro* v. *United States,* 210 F.2d 49 (C.A. 6). In this situation, the trial judge is not required to instruct the jury in the exact language requested by appellant. *United States* v. *Ball,* 344 F.2d 925 (C.A. 6), cert. denied, 382 U.S. 907.

Appellant also raises questions concerning the validity of the search warrant and the admissibility of evidence as the result of an allegedly unlawful search. He further charges that the district court committed prejudicial and reversible error in permitting the United States Attorney to make an improper argument to the jury. These and all other contentions of appellant have been considered and we hold that there is no ground for reversal.

Affirmed.

APPENDIX

CONSENT AGREEMENT

WHEREAS, CARL P. STAHL, doing business as HUNT AND COMPANY, and TAYLOR AND COMPANY, (not incorporated), sole proprietorships, and

WHEREAS, the aforesaid has been engaged in the manufacturing, sale and distribution of merchandise hereinafter described as Exhibit "A", which is attached hereto and made a part hereof, consisting of a list of merchandise by catalogue number and the HUNT AND COMPANY catalogue; and

WHEREAS, said merchandise (See Exhibit "A") may be used for gambling purposes in violation of the laws of several states and of the United States; and

WHEREAS, CARL STAHL, doing business as HUNT AND COMPANY, and TAYLOR AND COMPANY, recognize that the continued manufacturing, printing, sale and distribution of said merchandise (See Exhibit "A") may subject them to prosecution by the Federal Government.

IT IS THEREFORE AGREED:

1. That CARL STAHL, doing business as HUNT AND COMPANY, and TAYLOR AND COMPANY, will forthwith and simultaneously with the signing of this Consent, cease and desist from the manufacturing, printing, sale or distribution of (See Exhibit "A") and other similar merchandise in interstate commerce.

2. That should CARL STAHL, doing business as HUNT AND COMPANY, and TAYLOR AND COMPANY, at any time resume the manufacturing, printing, sale or distri-

bution of such merchandise or similar merchandise, they will be subject to prosecution for said activities on their part since September 13, 1961, however, nothing contained herein shall in any way be construed as a waiver of any statutory period of limitations with respect to any such prosecutions.

3. Further, it is agreed that from this date, the undersigned will cease and desist from shipping in interstate commerce any other item which violates Section 1952, Title 18, United States Code.

4. Further, this Consent Agreement shall not be exhibited as evidence in any future prosecutive action regarding CARL STAHL, doing business as HUNT AND COMPANY, and TAYLOR AND COMPANY, and shall not be considered an admission that the aforesaid has at any time engaged in any activities violative of the laws of the United States of America or of any State or political subdivision thereof.

5. All items marked with an asterisk in Exhibit "A" may be shipped where such items are not illegal under state law.

* * * * *

APPENDIX B

18 USC 1952

Section 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Fourth Amendment to the Constitution of the United States

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Ninth Amendment to the Constitution of the United States

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment to the Constitution of the United States

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Copyright 1966 by W. S. Moore

Hederman Bros., Jackson, Miss.

AFFIDAVIT FOR SEARCH WARRANT

STATE OF
COUNTY OF

This day personally appeared before me, the undersigned judicial officer of said county, _____, _____ and _____ known to me to be credible persons, who, after having been first duly sworn, depose and say:

1. That affiants have good reason to believe and do believe that certain things hereafter described are now being concealed in or about the following place in this County: *(here particularly describe the place to be searched.)*

together with all approaches and appurtenances thereto.

2. That the place described above is occupied and controlled by:

3. That said things are particularly described as follows: *(here describe the thing or things to be seized, taking care to describe only those things which affiants have probable cause to believe and do believe are concealed at the place described above, and with enough particularity to insure that an uninformed officer will not seize one thing under a warrant describing another. Mere evidence is not a proper subject of a search or seizure. Certain things subject to search and seizure include, in addition to the specific subjects enumerated in the Code, all contraband; instrumentalities used in the commission of a crime; and books, writings, pictures and prints adjudged in a proper proceeding by a proper court to be obscene.)*

4. That possession of the above described things is in itself unlawful (or the public has a primary interest in, or primary right to possession of, the above described things), in that said things are: *(here state briefly the use and intention for use of the specified things, citing the appropriate Code section or ordinance being violated and charging its violation, and a brief narrative account of the offense being committed.)*

5. The facts tending to establish the foregoing grounds for issuance of a Search Warrant are shown on a sheet headed "Underlying Facts and Circumstances" which is attached hereto, made a part hereof and adopted herein by reference. *(The attached sheet must contain enough of the underlying facts and circumstances to enable the issuing officer to fairly ascertain that probable cause exists for the issuance of the warrant. All persons having knowledge of the facts should sign the affidavit and attached sheet, be identified throughout by name, and appear before the issuing officer for examination.*

Information obtained from informants must be described as reliable and the informants identified as credible persons. It is not absolutely essential that the identity of the informants be disclosed, but there must be shown enough of the underlying facts and circumstances from which the affiants conclude that the informants are credible and their information reliable.

Avoid vague recitals such as "suspect was observed" and "The Sheriff's office received information." Use factual recitals showing names, places, times and dates, in commonsense, non-technical language. Be specific and give the information in detail.)

6. WHEREFORE, affiants request that a search warrant issue directing a search of the above described place and seizure of the above described things.

_____ _____

Affiant Affiant

_____ _____

Affiant Affiant

Sworn to and subscribed before me, the_____day of_____, 19____.

_____

Official Title